

**Public Comments and Agency Responses to the Proposed Major Modifications to
General NPDES Permits for Alaskan Log Transfer Facilities
AK-G70-0000 and AK-G70-1000**

Proposed Modification No. 1 – Modification No. 1 was proposed to: (1) delete language allowing the Director of EPA Region 10 Office of Water to cover a facility without an NOI or Notification and add language that an LTF is not authorized to be covered without both a submittal of a complete and accurate NOI and State authorization of a zone of deposit in a written decision document; and (2) to delete language for the ADEC to have an option to rescind the zone of deposit for a permitted facility.

Final Modification No. 1 – **AK-G70-1000 is modified to provide that to seek authorization to discharge under the permit, a discharger must provide a complete NOI and receive authorization for a project area ZOD from ADEC through a final decision document. EPA may cover dischargers under the general permit if no NOI is received but there will not be an authorized project area ZOD. AK-G70-0000 is modified to provide that to be authorized to discharge within a project area ZOD, permittees must submit a complete Notification and receive authorization from ADEC for such a ZOD through a final decision document.**

COMMENTS IN FAVOR of the Proposed Modification: Public comments in favor of the proposed modification were submitted by NRDC and SEACC.

1. We support the proposed modifications that preclude EPA from authorizing a zone of deposit prior to authorization by ADEC. Alaska law requires an anti-degradation review, including public participation of specific factors before a reduction in water quality can occur. 18 AAC 70.015. Alaska law also requires the analysis of specific factors, including “alternatives that would eliminate, or reduce, any adverse effects of the deposit,” “the potential impacts on aquatic life and other wildlife,” and “the potential impacts on other uses of the waterbody,” before the state can authorize a zone of deposit at a specific site. 18 AAC 70.210. Since a ZOD by definition reduces water quality, EPA cannot authorize such degradation before the state has completed the required site-specific analysis required by both Alaska’s anti-degradation and zone of deposit regulations.
2. As a result of the adjudication of ADEC’s certification of the general permits, ADEC must first provide public notice and the opportunity of comment on a proposed ZOD for several categories of log dumps. First, all new log dumps require public notice and the opportunity to comment prior to ADEC authorization of a ZOD at the site. Second, ADEC will provide the public notice and the opportunity to comment on ‘operating LTFs that have identified a material change in facility or operation from those authorized in prior permits’ prior to authorization of a ZOD at the site. Finally, ADEC will provide the public notice and the opportunity to comment on log dumps where existing continuous bark accumulations exceed one acre. Again, since EPA cannot issue permits that violate state law, EPA’s

permits cannot authorize the discharge of bark and woody debris within a ZOD before ADEC has completed its anti-degradation and zone of deposit reviews.

3. EPA must modify the relevant permit terms to accomplish the proposed modification. The permits should specify that ADEC “will consider” a ZOD for LTFs, rather than “has authorized” as now provided. The statement that ADEC “has authorized” a ZOD is factually incorrect given the ADEC hearing officer’s decision. In addition, EPA’s permits should address the public’s right to appeal in state court ADEC’s ZOD authorization at a specific log dump site. The hearing officer reviewing ADEC’s certification of EPA’s permits explicitly acknowledged the public’s right to appeal ADEC’s authorization of a ZOD at a particular log dump site. ADEC Final Decision, at 48. EPA’s permits should provide that any federal authorization to discharge will be stayed in the event that a state court stays ADEC’s ZOD authorization at a specific site. Likewise, EPA’s permits should provide that federal authorization to discharge at a specific site will be rescinded if a state court overturns ADEC’s ZOD authorization for that site.
4. Alaska’s zone of deposit and anti-degradation regulations do not prevent the general permits from taking immediate effect. It is only the ZOD, not the other permit terms, that result in a degradation of water quality. It is only the ZOD, not the other permit terms, that requires site-specific analysis. Consequently, EPA and the state can continue to move forward with implementing new monitoring, pollution prevention, remediation requirements, as well as best management practices. Neither EPA nor the state, however, can authorize the discharge of bark or woody debris at a particular site until the site-specific analysis required by Alaska’s anti-degradation and ZOD regulation is complete and ADEC has approved a ZOD.

COMMENTS IN OPPOSITION to the Proposed Modification: Public comments opposed to the proposed modification were submitted by Sealaska Corporation, State of Alaska, Alaska Department of Environmental Conservation, USFS, and Forest and Land Management.

1. There is no reason to delay EPA’s authorization until ADEC acts on its separate authorization. Under the present general NPDES permits, EPA and ADEC proceed concurrently in granting their respective authorizations to discharge under the federal and state general permits. EPA proposes to change that process, such that authorizations will be issued consecutively. That change risks materially delaying ultimate issuance of the authorizations, and there is no reason for it. The ADEC has already certified the General Permits and authorized a ZOD for discharges under the General Permits.
2. The ADEC objects to the proposed modification that would require State authorization of a ZOD prior to EPA taking action to authorize a discharge from a particular LTF under the GP. ADEC does not want to set up a process where either agency’s lack of resources could prevent the other from issuing timely authorizations under the GP. EPA’s perception that the Hearing Officer’s Final Decision requires this of EPA is inaccurate. The Final Decision only requires that the Department issue a written decision document for each site-

specific state wastewater general permit authorization. In order to obtain resource information in addition to that contained in the NOI or Notification, the Department will continue to solicit information from both the ADF&G and Natural Resources. The Department considers this information as well as the information contained in the NOI or Notification in making individual decision regarding a state authorization under the GP. If the NOI or Notification contains all the information required by EPA, was or is submitted in a timely fashion, qualifies for coverage and is not located in an excluded area defined in the permits, we can think of no legitimate reason for EPA to delay issuing a timely federal authorization or denial.

3. The ADEC objects to the proposal to delete language giving the Department the option to rescind the ZOD for a permitted facility. Alaska's CWA §401 certification of GP AK-G70-0000 (Section 8, page 4) describes Department authority to require the operator of a LTF to obtain an individual State wastewater discharge disposal permit as provided for in 18 AAC 72.910(d). A similar description is found in AK-G70-1000 (Section 10, page 4). The determination of whether or not a state individual permit is required is made via a Department review of information provided in the NOI or Notification. The EPA has no authority under the CWA to either issue or rescind a ZOD. It is a matter of state discretion under the Act and the Alaska laws and regulations. Furthermore, EPA has provided no justification or compelling information in the public notice that would warrant removal of the Department's ability to do so under the permit. While this authority already exists in state regulation, there is substantial value in explicitly stating this authority in the GP. It is important that LTF operators understand explicitly that the Department has the authority to rescind a ZOD even after the facility obtains a federal authorization.
4. The U.S. Forest Service objects to EPA's first proposal to add language stating that a LTF is not authorized to be covered without both (1) submittal of a complete and accurate NOI; and (2) State approval for coverage and authorization of a zone of deposit in a written decision document due to the State's lack of timeliness. The primary reason for this object is a history of non-performance by the ADEC. The ADEC failure to provide its portion of the process in a timely manner effectively provides a "pocket veto" of the issuance of the general permit under the proposed revision. The current process, which provides for authorization under the general permit if the State of Alaska fails to perform its Section 401 certification, provides protections for water quality and protections for the applicant. Current law, at 33 U.S.C. 1341(a)(1), provides for the issuance of permits if the appropriate State, interstate agency or Administrator fails or refuses to act on a request for certification within a reasonable period of time. The period of time allowed is a maximum of one year. The Forest Service believes the citation above is applicable and the time period provided has already been exceeded and that the proposed modification does not recognize the current authorization and should be revised.
5. Sealaska Timber Corporation (Sealaska or STC) comments that there is no legal or practical reason for conditioning authorization to discharge under the General Permits on receiving authorization from ADEC. Imposing this requirement could materially delay

EPA's authorization process. Under Section 407(b), P.L. 100-4, LTFs that were permitted by the Corps of Engineers on or before October 22, 1985 (the so-called "pre-85 LTFs") are exempt from the requirement of obtaining an NPDES permit. EPA's authority over these LTFs is limited to its ability to "modif[y]...the existing permit under Section 404," and then only "after an opportunity for hearing." Although it is called an NPDES permit for convenience, Permit AK-G70-0000 is not an NPDES permit, nor could it be. It is rather, a compendium of amendments to the pre-1985 §404 permits of Alaska's pre-85 LTFs. As to each such LTF, those amendments cannot be effective, over the objections of the permittee, unless EPA has provided that permittee an "opportunity for hearing." Any of the material changes to the pre-85 §404 permits being considered by EPA would change the legal significance of conduct that, for periods upwards of 20 years, has been lawful under both federal and state law. In some (and perhaps many) instances, for example, there has been, to this point, no rigid, one-acre limit on continuous bark accumulations. And in no case has there heretofore been any legal significance to a continuous bark accumulation of less than one acre. In this context, EPA's proposed material modifications to Sealaska's §404 permits would violate our due process rights, as well as §407(b), unless Sealaska and STC are first provided individual adjudicatory hearings that comply with both 5 U.S.C. §554 and 40 C.F.R. §§124.71

6. Congress made it clear that pre-85 LTFs, while being subject to the substantive requirements of both §§402 and 404, would be subject to the procedural requirements of only §404. In other words, pre-85 LTFs would deal only with the Corps. This is apparent from two aspects of §407(b):
 - (1) Pre-85 LTFs "shall not be required to submit a new application for a[n] [NPDES] permit under Section 402 of [the Clean Water Act]", and
 - (2) While EPA could amend the substantive terms of the pre-85 LTFs' Corps permits, EPA was not authorized, under any circumstances, to bring these LTFs under its direct regulatory control. Rather, EPA could only 'modif[y]...*the exiting permit under Section 404 of such Act* to incorporate such applicable [substantive] requirements..."
 - (3) Sealaska comments that a modification which requires EPA authorization to discharge under the pre-1985 LTF Corps permits was not disclosed in the public notice, even as a "minor change." The change is disclosed only in the actual permit language, and it is, in fact, a major change. The existing permit intentionally omitted any EPA approval requirement for pre-85 LTFs, because these LTFs are exempt from the NPDES permit program under Section 407, P.L. 100-4.

EPA RESPONSE TO COMMENTS ON PROPOSED MODIFICATION NO. 1:

Modification No. 1 is necessary due to the result of the adjudication of the State of Alaska's Water Quality Certifications, otherwise known as Section 401 Certifications, on the

original LTF General Permits. One of the Alaska State Hearings Officer's determinations was that ADEC needed to perform additional analysis before a discharge to a project area zone of deposit (ZOD) could occur. Specifically, the Hearings Officer provided that "an anti-degradation analysis must be undertaken, but may be deferred until after an [Notice of Intent] is received so long as any necessary site-specific findings are provided before an actual discharge is allowed." May 10, 2002, Final Decision, page 5. Since EPA does not have authority to authorize discharges that exceed the state residue water quality standard or to authorize a ZOD under 18 AAC 70.210, the project area ZOD is not effective until ADEC acts.

Modification No. 1 is not based on EPA's authority to issue the LTF General Permits. This modification is about when the project area ZOD issued by ADEC is legally effective. Some of the comments characterize the modification as procedural only and claim EPA can do its own procedure in authorizing discharges under the NPDES permits separate from the procedure the State must undertake to issue a state wastewater discharge permit. EPA agrees that it can cover facilities under the LTF General Permit without waiting for the State of Alaska to permit them under the state wastewater law. But EPA cannot authorize a discharge to a ZOD until the State has taken all of the steps required under state law to authorize the ZOD. The adjudication created a sequenced process for how the State can comply with state water quality standards, specifically, 18 AAC 70.015 and 18 ACC 70.210, in authorizing the project area ZOD for each facility under the LTF general permit scheme. Until the sequenced process is complete, and ADEC issues a final decision document with its anti-degradation and ZOD findings, no discharge that exceeds the state residue standard may occur. EPA could cover an LTF discharger under the appropriate NPDES General Permit prior to ADEC's final decision document; however, the LTF discharger would not be authorized to discharge bark or woody debris into the ZOD under EPA's authorization. If a LTF discharger can show that it can operate and comply with the residue standard and does not need a ZOD authorized by ADEC, EPA can consider covering that discharger under the general permit without a ZOD.

Modification No. 1 notifies applicants and/or permittees under AK-G70-1000 and AK-G70-0000, respectively, that final ADEC action is required prior to the project area ZOD being effective. The modification does not change the original AK-G70-1000 condition that EPA may cover a LTF discharger under the General Permit without receipt of an NOI. However, clarifying language has been added to indicate that no project area ZOD would be included in such authorization.

Modification No. 1 deletes the State ZOD rescission language because, under the proposed modification, EPA would not be authorizing a discharge until after the State does a site-specific ZOD review, coordinated with other state agencies, and issued its final decision on anti-degradation and ZOD findings for the facility. Given the sequenced process, it is less likely that ADEC would seek to later rescind the project area ZOD. The ADEC's comments acknowledge that it has the authority to rescind the ZOD upon learning new information and that a statement in the permit does not change that authority. Given the history of the LTF General Permits, in particular the ZOD development and appeal, it is less confusing to the regulated community if

the rescission language is deleted, and clear language is added about the process for obtaining the ZOD authorization from ADEC, which this modification adds.

In response to the United States Forest Services' comment about timeliness, EPA agrees the Clean Water Act places limits on the time that the State has to provide a Section 401 certification, after which EPA may choose to issue a permit. However, this modification addresses the issuance of a zone of deposit under state law, which EPA cannot do. The modification EPA is making has nothing to do with waiting for a Section 401 certification. The circumstances of this case require that for any particular LTF discharger to have an authorized project area ZOD, the State needs to complete an anti-degradation analysis and the findings required by the ZOD regulations. The modification being made merely reflects the practical reality that in a majority of the cases, EPA will wait until the ZOD has been authorized prior to authorizing the LTF discharger under the General Permit.

AK-G70-0000, the pre-1985 LTF General Permit, modified existing Section 404 permits received prior to October 22, 1985, to bring those permits into compliance with the Clean Water Act. EPA does not agree with some commenters' interpretation of EPA's authority under Section 407 of Public Law 100-4. The use of a general permit to modify existing permits is not prohibited by Section 407 of Public Law 100-4, the CWA, or EPA's implementing regulations. Section 407 of Public Law 100-4 authorizes EPA (not the Corps of Engineers) to modify Section 404 permits issued for LTFs prior to October 22, 1985, in order to incorporate the applicable requirements of the Clean Water Act (CWA). EPA's authority to issue a general permit by which Section 404 permits would be amended to come into compliance with the Clean Water Act is not an issue that can be raised regarding the proposed major modifications. The issue was raised in public comments on the original general permits and EPA's responses to those comments are in the administrative record for the original general permits. Only procedural or substantive issues regarding the proposed modifications are within the scope of these modifications and this public comment period. *See* 40 CFR §§ 122.62 and 124.5(c)(2).

This modification, as explained above, results from the decision reached in a state adjudication of the Section 401 certifications on the original LTF permits. As a consequence of the state adjudication, prior to authorizing a discharge to the project area ZOD described in the Section 401 Certifications, a final anti-degradation analysis and final ZOD findings for each facility is required. Modification No. 1 to the existing Section 404 permits makes clear the status of the ZOD authorization and when the ZOD will be effective under AK-G70-0000. That is the purpose and intent behind the final modification for that permit. Pre-1985 facilities whose Section 404 permits were amended by AK-G70-0000 must comply with all of the terms of the permit as originally issued, and/or modified hereby. In accordance with state law, authorization to discharge to a project area ZOD is not effective until the State issues a final anti-degradation and ZOD analysis approving it.

EPA has complied with the EPA regulations for modifying the LTF General Permit, in particular AK-G70-0000. 40 CFR Part 124 contains the procedures for issuing and modifying permits. Those procedures apply to both individual permits and general permits. EPA tentatively

decided to modify AK-G70-0000 and prepared a draft permit, statement of basis, public notice, and took public comment in accordance with 40 CFR §124.5 and §124.6. The public comment timeframe was extended twice to accommodate requests from interested parties. *See* 67 Fed. Reg. 64885 (October 22, 2002), 67 Fed. Reg. 68869-01 (November 13, 2002), and 68 Fed. Reg. 2540-01 (January 17, 2003).

The affected permittees had an opportunity to provide comments and request a hearing on the proposed modifications. Any appeal of the final decision regarding the Section 402 modifications may be through procedures established at 40 CFR Part 124 (40 CFR §124.71) and 33 USC §1369 (appeal of permit issuance is to the U.S. Circuit Court of Appeals). Additionally, an individual Section 404 permittee may request other modifications related to Section 402 discharges of pollutants on a facility-specific basis under 40 CFR §§ 122.62 or 122.63.

Proposed Modification No. 2 – Modification No. 2 proposed that LTFs located in waterbodies impaired for bark residues could not be authorized under the general NPDES permits. EPA proposed a major modification to delete the qualification “new” for dischargers in waterbodies impaired by bark residues.

Final Modification No. 2 – **Withdrawn; no modification.**

COMMENTS IN FAVOR of the Proposed Modification: Public comments in favor of the proposed modification were submitted by NRDC, SEACC, Campaign to Safeguard America’s Waters (C-SAW), Organized Village of Kake, Hydaburg Cooperative Association, Hoonah Indian Association, Kay Andrew, Brian McNitt, Floyd Peterson, and Joseph Sebastian. Comments raised in the public comments are as follows:

1. We support EPA’s proposed modification to exclude LTFs located in impaired waters from coverage under the general NPDES permits. This exclusion must apply to both pre-1985 and post-1985 permits. The ADEC hearing officer reviewing ADEC’s certification of the general permits held that Alaska law precludes the use of general permits to authorize activities in § 303(d) listed waterbodies. EPA cannot issue an NPDES permits that would violate Alaska Water Quality Standards.
2. EPA cannot justify providing blanket authorization for additional pollutant discharges into waters that already violate Alaska Water Quality Standards as this is inconsistent with the Clean Water Act’s goal of “restoring and maintaining ... the Nation’s waters.”

COMMENTS IN OPPOSITION to the Proposed Modification: Public comments opposed to the proposed modification were submitted by Russell Cockrum, The Trust Land Office, Forest and land Management, Inc., Resources Development Council (RDC), Alaska Forest Association, Concerned Alaskans, Sealaska, Ketchikan Gateway Borough, State of Alaska, ADEC, University of Alaska, USDA Forest Service.

1. EPA is proposing to exclude discharges from LTFs into any §303(d) listed water from the General Permits, and it asserts that the exclusion is “necessary to implement the ruling of the State Final Decision.” The hearing officer excluded impaired waters from the state wastewater discharge permit only because:
 - 18 AAC 72.900(a)(5) prohibits ADEC from issuing a *state wastewater discharge permit* if doing so would “threaten” water quality; and
 - because §303(d) listed waters have already been determined by ADEC to be “threatened” (by virtue of their listing), 18 AAC 72.9000(a)(5) prohibits ADEC from issuing a state general permit for any discharge into any §303(d) listed water.
2. By its terms, 18 AAC 72.900(a)(5) applies only to ADEC’s issuance of a state wastewater permit, and it is not a water quality standard. It therefore does not affect EPA’s authority to issue its own general permits.
3. There is no reason to exclude discharges into §303(d) waters from the federal general permits. When total maximum daily loads (“TMDL’s”) are developed for particular waters, special rules will be imposed governing discharges into those waters, and these rules will be in addition to the terms of any existing NPDES permit. Those TMDLs will be the same irrespective of whether the LTF’s NPDES permit is general or individual. Until those TMDLs are developed, no purpose is served by forcing these LTFs (or the agencies) to incur the further burden of another, separate agency process. Excluding these LTFs from the federal general permits, then, seems more punitive than remedial.
4. The ADEC asked the State Hearing Officer to reconsider the Proposed Decision to exclude the use of the general permit in waterbodies that are impaired for reasons other than prior LTF operations. This request was denied. He decided “The ruling that general permits may not be used to a listed waterbody is based upon the legal conclusion that the discharge of a pollutant into a listed waterbody further impairs the waterbody as a matter of law.” In the May 10, 2002 Final Decision he stated “In particular, with respect to the exclusion of listed waterbodies, I leave it to DEC to determine whether a revised certification is necessary, or whether the Final Decision may best be implemented by another means.” The Department has elected to not revise the certifications given the option to implement the Final Decision through administrative practices.
5. The Hearing Officer’s Final Decision precludes the Department from extending GP authorization to a facility located on an impaired waterbody. While the Department has no choice in this matter pursuant to the adjudication Hearing Officer’s Decision, we are commenting to suggest there are a number of different paths for EPA to consider.
 - If EPA does modify the GPS to include this provision, the language in the GPs on impaired waters could be re-written as follows: The NPDES General Permit may not authorize a “discharger” to discharge bark and wood debris into any segment of a waterbody included in the Department’s CWA Section 305(b) report or CWA Section 303(d) list of waters, that is “impaired” or “water quality limited”

- The ADEC suggests there are two approaches EPA could consider if this change is implemented:
 - (1) EPA would issue individual NPDES permits to the small number of facilities that would require them. The Department estimates seven facilities would be required to obtain an individual wastewater discharge permit; or
 - (2) Add a provision to the permit providing an LTF operator the opportunity to apply for a waiver from this exclusion and obtain GP authorization from EPA. Alaska General NPDES Permit No. AK-G52-0000 excludes coverage for facilities located on impaired waterbodies but contains a waiver provision for seafood processors located on impaired waterbodies. EPA may wish to consider a similar waiver provision in the modified LTF GPs to facilitate permitting efficiencies for both agencies. If no waiver provision is made, and the Department begins issuing individual permits prior to EPA, an LTF operator could be required to obtain two individual permits for the same discharge.
 - Alternatively, if EPA does not modify the GPs, the Department will still be required to issue an individual state permit rather than authorize the action under the GP. The Department is not opposed to this approach, though both workload and timeliness are issues of concern.
6. Since Ward Cove has been declared an impaired water body, the changes proposed by the EPA would result in log transfer and log storage operations no longer being allowed in Ward Cove under the LTF General Permit. This would force the Ketchikan Borough to seek an individual permit which would most likely take years.
 7. This modification would deny authorization to discharge into water bodies listed as impaired under CWA Section 303(d). EPA fails to both consider the pre-1985 status of many sites affected by this proposed policy and to recognize that continued operation of the pre-1985 sites is environmentally preferable to developing new facilities.
 8. The decision of whether or not to authorize discharges into impaired waterbodies should be a case-by-case decision based on site specific information, conditions, and alternatives. The listing of waterbodies as impaired is not scientific or factual evidence based listing, rather it is a listing based on presumptions that indicate that further study of the condition of the waterbody is needed. Additionally, the boundaries of impaired waterbodies are not adequately defined and therefore an otherwise preferred LTF site could be prohibited only because of its proximity to an “impaired” waterbody.
 9. A close review of the hearing officer’s decision indicates he ruled that, as a matter of State law, general permits cannot be used to authorize discharge activities in waterbodies listed on the 303(d) list. The basis for this ruling is that State regulation 18 AAC 72.900(a)(5) does not allow general permits that “threaten” water quality. It is noteworthy that this regulation is not part of Alaska’s water quality regulations. Nor does it have anything to do with NPDES permits. Rather, it is focused on the issuance of State wastewater discharge permits.

EPA RESPONSE TO COMMENTS ON PROPOSED MODIFICATION NO. 2:

The proposed Modification No. 2 was based on a mistaken interpretation of the State adjudicatory decision. The State Hearings Officer determined that 18 AAC 72.900(a)(5) prohibits ADEC from issuing a state wastewater discharge general permit if doing so would “threaten” water quality. The State Hearings Officer found that Section 303(d) listed waters have been determined by ADEC to be “threatened” as defined by 18 AAC 72.900(a)(5) by virtue of their listing. Therefore, the State Hearings Officer decided that state law prohibits ADEC from issuing general permits for discharges into impaired waters. Initially, EPA believed that the decision was based on an interpretation of Alaska’s water quality standards. However, it is now clear that the decision was based solely on an interpretation of the meaning of 18 AAC 72.900(a)(5), which is not a water quality standard and it does not affect EPA’s authority to issue federal NPDES general permits.

Under the CWA and its implementing regulations, there is no prohibition to authorizing pre-existing dischargers into impaired waters under NPDES general permits. Federal regulation prohibits the issuance of a permit for a new discharger which would cause or contribute to a violation in water quality standards 40 CFR §122.4(I). The regulations related to authorizing discharges in impaired waters was discussed in more detail in the Response to Comments on General NPDES Permit AK G70-1000: Log Transfer Facilities in Alaska, which is in the administrative record for the original permit. EPA has determined not to make the proposed modification to the original language.

Proposed Modification No. 3 - EPA proposed Modification No. 3 to include an explicit limit that the continuous coverage of bark and woody debris at a thickness greater than 10 cm at any point on the ocean bottom shall not exceed 1.0 acre.

Final Modification: Withdrawn; no modification.

EPA GENERAL RESPONSE TO COMMENTS ON PROPOSED MODIFICATION NO. 3:

Modification No. 3 was proposed to elicit comments on the merits of two options: (1) adding an enforceable permit limit to the LTF NPDES General Permits on the extent of the continuous coverage of bark and woody debris within the project area ZOD, or (2) proceeding with the Section 401 Certifications that include a one acre threshold of continuous coverage of bark and woody debris within the project area ZOD that would trigger a remediation plan under state law. As the breadth of public comments summarized below indicates, there are pros and cons for both a permit limit and for a permit threshold (for remediation) on the continuous deposit of bark and woody debris. Public comment, particularly from the State of Alaska, has persuaded EPA that establishing a threshold of one acre for the development and implementation of a remediation plan is a reasonable water quality-based approach to controlling the residue deposition from log transfer facility discharges and protecting water quality. As a result of the state administrative

adjudication of the Section 401 Certifications, the project area ZOD was found, on its face, not to violate Alaska water quality standards. The state adjudication also determined that ADEC must do a site-specific review under the State's anti-degradation regulation and ZOD regulation before authorizing a project area ZOD for any particular LTF. An appeal to state court may be made on a case-by-case basis upon ADEC's issuance of a final decision document authorizing the project area ZOD for any particular LTF. Given the state process in place related to authorization of a project area ZOD for each LTF and the remediation plan process, EPA has decided, based on the current record, that it is not necessary for EPA to place additional limits or standards in the LTF NPDES General Permits related to continuous bark deposition. The remediation plan process will be triggered once continuous coverage exceeds one acre and 10 centimeters in thickness at any point. EPA finds that the State's one acre threshold and remediation plan process, as considered and approved by the Alaska State Hearing Officer decision are a sufficient regulatory control of the discharges of bark and woody debris from LTFs and are protective of Alaska Water Quality Standards based on the current record. EPA has determined not to make the proposed modification to the original permit language. The NPDES General Permits will retain the same language as originally issued.

Due to the number and varying nature of the comments received on Proposed Modification No. 3, EPA provides specific responses to comments categorized first as 'in favor' and 'in opposition' to the proposed modification and categorized second by issue below.

COMMENTS IN FAVOR of the Proposed Modification No. 3: Public comments in favor of the proposed modification were submitted by NRDC, SEACC, Campaign to Safeguard America's Waters (C-SAW), NMFS, USFWS, Village of Kake, Hydaburg Cooperative Association, Hoonah Indian Association, Kay Andrew, Brian McNitt, Floyd Peterson, and Joseph Sebastian.

Protecting Existing Uses/Clean Water Act Anti-degradation Requirements.

1. I support the proposed modifications to the general permits and express my concern about EPA's suggestion that an one acre ZOD can somehow satisfy EPA's duty under the CWA to fully protect existing uses. I depend upon the purity of these waters, including Clarence Strait, Cholmondeley Sound the Tongass Narrows. The log facility in Dora Bay, which is south across Cholmondeley Sound from Sunny Cove, has been of concern to me for many years. Dora Bay used to be a good place for shrimp and halibut fishing. But as the uplands became more developed, and more logs were stored in the bay, we caught fewer and fewer shrimp. With tugs towing rafts of logs into the bay during all hours of the day, many shrimp pots were snagged and drug off the grounds. Before long, we shifted our efforts to other places. The site west of Sunny Cove proposed by the U.S. Forest Service for a log facility is adjacent to our oyster farm. The development of this log facility would severely impact our oyster farm, which depends upon the currently pure marine waters.
2. Even the one-acre ZOD limit that EPA proposes to apply hasn't safeguarded my use of waters at Long Island and Eight Fathom Bight where logs are transferred. How can EPA

consciously let the State of Alaska allow activities that harm existing uses consistent with the CWA? In FY2001, the Alaska Water Quality standards plainly identify the growth and propagation of fish...as uses of marine waters to be protected by the water quality standards. The ZOD, however, exempts log transfer facilities from the strict water quality standards prohibiting all deposit of residue. I use the waters of Southeastern Alaska as part of my livelihood; for subsistence food gathering; and for several forms of recreation. Allowing ZODs around new log facilities will harm my existing uses of the water. Each new area that is allowed to be covered with bark and wood debris through the permitting of these ZODs will be an area that I can no longer use for subsistence or sport harvest. Also, as more and more productive areas are lost to habitat damage from logging I am forced to travel farther from home.

3. I support all attempts by EPA to address the environmental impacts of log transfer facilities. However, I am confused by the fact that EPA believes that limiting a log transfer facility's bark accumulation to one acre will protect the existing uses and resources that I harvest from these waters. The Long Island and Eight Fathom Bight log transfer facilities currently have a one-acre ZOD; and these areas have been degraded. What basis does EPA have for concluding that ANY accumulation of bark and wood debris in a ZOD will not harm these traditional use waters? EPA needs to close the ZOD loophole in the interest of protecting the designated uses of waters that are important to Southeast Alaskans for commercial, sport and subsistence values.
4. We support the modification because the CWA requires EPA to impose control or limits to discharges of pollutants into our productive marine waters to avoid and mitigate impacts to existing uses of those waters, such as our subsistence gathering. We also declare, that we remain strongly opposed to the use of any size of zone of deposit to excuse the discharge and accumulation of bark and woody debris into our marine waters because this pollution directly interferes with and harms our uses of these waters. The subsistence lifestyle of 640 Organized Village of Kake members demands that we utilize natural resources in our traditional areas. Because log facilities are all around us, we are very familiar with their effects on the resources upon which we depend. The bottom beneath the facilities is fouled with wire, cable and water-soaked logs that are half or fully suspended under. The large amounts of bark and wood debris from the facilities have created a dead zone for the marine life we value. The water pollution caused by log facilities and its negative ecological effects adversely impacts our Tribe in very direct ways. The salmon and crabs are gone, and other shellfish are inedible, turning black and emitting the foul smell of ammonia. It is well known by traditional users that areas near log transfer facilities are ruined for customary and traditional food gathering purposes. First, the plants that we once picked in the areas are covered up by bark from log facilities; beach greens ...and other plants are buried forever. Once a log facility begins operation, the crabs, clams, and gum boots (chiton) die, and the halibut, salmon, waterfowl, and trout are forced to move to another area that may not be too favorable or crowded. Second, the reduced water quality caused by log facilities makes subsistence living far more difficult. The Tribe can scarcely use the areas around the log facilities. We cannot use the area for fishing, crabbing,

digging clams because of the bark and debris of the log facility. The log facilities in our foraging area require us to go further and further to subsist. This, in turn, leads to conflicts with other land users, increased expense, and overuse of certain lands and waters. It also forces us to spend more time foraging in dangerous weather. Third, and most important, water pollution from log facilities threatens our very way of life. Our Tribe is intimately connected to the lands and waters upon which we subsist. The existing and proposed log transfer sites disrupt our connection to the land and water because of the pollution case by log facilities. This very issue is subject to the principles of Environmental Justice because of the impacts that pollution has on minorities in economically depressed areas. It is within this area, proposed for log facilities that we gather all that we need to exist. Water pollution from log facilities is not merely an inconvenience; it is a threat to the way the Tribe has chosen to live since time immemorial. In fact, such a limit has not prevented the State and EPA from having to list culturally important water bodies like Saginaw and Rowan Bay as impaired because of their inability to meet water quality standards.

5. The Hydaburg Cooperative Association Tribal Council is located on the southern end of Prince of Wales Island. The permits for these types of log transfer facilities are all in our traditional use areas all along Sukkwaan Straight that we harvest food to feed our families. When we asked our subsistence gatherers, they have told us they have to go further, spend more time and fuel in all gathering activities specifically Saltery. The testimonies have one theme in common; we are not able to get our subsistence needs met in traditional use areas that have been polluted by logging.
6. The largest log transfer facility currently in operation in our area is Long Island, directly in front of the village of Hoonah. Elders and older subsistence gatherers speak of the time prior to the establishment of the log transfer facility when the area provided a rich variety of resources that were easily gathered. This is no longer the case. In areas where log transfer facilities have operated and continue to operate, subsistence activity has been radically altered. The herring are gone and with them, the King salmon.
7. One must question EPA for going back to a one acre limit for ZODs. I would argue EPA is being too lax. How can a ZOD which imperils productive marine habitat be consistent with the anti-degradation requirements of the CWA? Especially when existing marine uses remain unprotected. Alaska water quality standards clearly identify that fish, shellfish, wildlife and aquatic life forms of marine waters are meant to be protected by the state water quality standards. It would seem reasonable that for operators who wish to transfer logs in waters, that ZODs should only apply to when they are operating. Then they should held to clean up the ZOD when they are done, to reasonable specifications. Why should the public and the intertidal zone have to pay the long term costs of slipshod management practices? The operator should have to internalize these costs. More stringent clean up standards would make barges of logs look more economic. It is high time a transition was made away from allowing ZODs to exist in the first place.

EPA Response to Comments on Protecting Existing Uses/Clean Water Act Anti-degradation Requirements: Proposed Modification No. 3 is not needed because antidegradation requirements to protect and maintain existing uses of a waterbody to which a discharge will occur are met by the NPDES General Permits as otherwise modified. EPA is modifying the permits (Modification No. 1 above) to clarify that EPA will not authorize a discharge to the project area ZOD until ADEC issues a final decision document on its antidegradation review for that facility. ADEC will seek public comment on its proposed antidegradation decisions for new LTFs and in circumstances where an existing LTF plans to modify its discharging operation or location. Furthermore, because under State law, ADEC cannot use a general permit to authorize discharges to waters designated as impaired, ADEC will be issuing individual permits and conducting individual antidegradation analyses for LTFs located in impaired waters.

Alaska Water Quality Standards allow for zones of deposit in which water quality standards may be exceeded. The State adjudication upheld ADEC's Section 401 certifications, including the project area ZOD, under the condition that ADEC perform a site-specific review of, among other things, how the ZOD would affect existing uses. Whether the project area ZOD is appropriate for any particular LTF will be determined by the State after receiving the NOI and performing its antidegradation and ZOD analysis. Likewise, EPA may determine based on the NOI or other information that the LTF NPDES General Permit would not sufficiently control the discharge from a particular LTF, in which event, the operator of the LTF would be required to apply for an individual permit.

Environmental Impacts of Bark and Woody Debris/Ocean Discharge Criteria

8. Studies on the effects of bark in the marine environment near log transfer facilities, interpreted by timber corporations and those who would wish to continue log transfer facility activities unopposed suggest that the harmful effects of these practices are inconclusive. We strongly disagree with this interpretation and suggest that these proposed permit modifications by EPA are long overdue.
9. The deposition of bark by LTFs is a well-documented, damaging and persistent pollutant that reduces both the quantity and quality of habitat available for living marine resources.
10. The EPA should make it illegal to create continuous deposits of bark and woody debris on the sea floor. Continuous deposits of bark and woody debris on the sea floor kill marine life, destroy benthic communities, degrade the environment of the surrounding waters, and impose a barrier to the movement of bottom organisms along the sea floor and between shallow and deeper depths. The impacts are serious and last for decades.
11. EPA's evaluation of the effects of LTF discharges on ocean discharge criteria under CWA § 403(c) is predicated upon a limit of one acre on the continuous coverage of bark and woody debris. EPA has not completed an evaluation of the effects of a project area deposit that could exceed 20 acres and has not determined that this extent of bark coverage does

not impose irreparable harm or unreasonable degradation of the marine environment. Therefore, the NPDES permits no. AK-G70-0000 and AK-G70-1000 do not meet the requirements of CWA § 403(c) and cannot be issued without a limit of one acre on the continuous coverage of bark and woody debris.

12. The analysis that EPA has completed to fulfill its responsibilities under Section 403 was based on a one-acre ZOD. The consultant's report prepared pursuant to Section 403 was completed before ADEC expanded its ZOD authorization from one-acre to a log dump's entire project area. See, USEPA by Tetra Tech, Ocean Discharge Criteria Evaluation of the NPDES General Permit for Alaska Log Transfer Facilities (1996) ("Tetra Tech"). This report documents the numerous ways in which bark accumulation harms the marine environment.
13. In the Clean Water Act, the Congress explicitly chose to prohibit a discharge into marine water unless EPA could definitely establish that unreasonable degradation would not occur. Here, EPA has not supported such a conclusion for a one-acre ZOD and it certainly cannot support such a conclusion for project-area ZOD with no permit limit on continuous bark accumulation.

EPA Response to Comments on Environmental Impacts of Bark and Woody Debris and the Ocean Discharge Criteria Analysis. The proposed modification to add a one acre limit on continuous coverage is not necessary to ensure that no unreasonable degradation to the marine environment will occur from the discharges. The studies and information regarding the environmental effects of deposition of bark and woody debris from LTFs was discussed in EPA's Fact Sheet for the original draft LTF General Permit, 61 Fed. Reg. 57,425 (November 6, 1996), and contained in the administrative record for the original general permits. Information provided with the public comments on the proposed modifications does not contradict and, in large part, supports EPA's previous determination that discharges of bark and woody debris that comply with the terms and conditions of the general permits, as modified, will protect state water quality standards and will not cause unreasonable degradation of the marine environment.

The effects of bark and woody debris discharges on water quality and aquatic organisms are the result of physical and chemical changes resulting from the accumulation of piles of bark and woody debris on the bottom and decomposition of this organic debris. Smothering of the ocean bottom by bark and woody debris adversely affects and/or eliminates almost all aquatic species in, under, and immediately adjacent to continuous deposits of ten centimeters thickness or greater. Propagation of fish and aquatic organisms can be affected by large accumulations of bark in certain types of waterbodies, such as bays with highly constrained bottom circulation and water column turnover. Chemical leachates and oxygen depletion from decomposing wood debris may occur, particularly as the accumulations get thicker. However, detrimental effects will be localized to the area of continuous bark coverage if there is good water circulation or mixing in the waterbody where the continuous coverage is located.

Fundamental to controlling the impacts of bark and woody debris discharged at LTFs is the control and minimization of the amount of such debris that settles and accumulates on the ocean bottom. For approximately 20 years, the LTF siting criteria and operational practices developed through the Alaska Timber Task Force (ATTF) Guideline process have been implemented and have significantly decreased the amount of bark and woody debris that has been deposited on the ocean bottom at LTFs. These ATTF Guideline siting criteria and operational practices are contained in the general permits as well as additional monitoring requirements to track the deposition of bark and woody debris. Additionally, the State's remediation plan process, triggered when continuous bark coverage exceeds one acre and 10 centimeters in depth at any point, is another mechanism by which bark accumulations will be studied and measures taken to reduce impacts from the bark and woody debris discharges under the general permits.

EPA's modified permits meet the requirements of the Ocean Discharge Criteria at 40 CFR Part 125, Subpart M.. The record for the original general permits, along with the record for these modifications to the permits, support EPA's determination that discharges of bark and woody debris in compliance with the terms and conditions of the general permits will not cause unreasonable degradation to the marine environment. EPA and ADEC concur that seafloor monitoring is a necessary and central permit condition and has gained important information from the dive surveys at LTFs completed during the last four years, information indicating that LTFs sited and operated in accordance with the ATTF Guidelines do not cause unreasonable degradation of the marine environment. EPA's ocean discharge criteria evaluation was sufficient and looked at the appropriate factors.

Anti-backsliding

14. Increasing the zone of deposit from one acre to "the project area" would violate the anti-backsliding requirements of the Clean Water Act and federal regulations, whereby permit limits, requirements and conditions cannot be made less stringent than previous limits, requirements and conditions.

EPA Response to Comments on Anti-backsliding: EPA's decision not to add a one acre limit on continuous coverage on the ocean bottom is not backsliding from previous LTF individual permits that contained state-authorized one acre ZODs because the State 401 certifications, as modified by the state adjudication, are as stringent, if not more so, than previous state-issued one acre ZODs. ADEC authorized in previous individual NPDES permits ZODs for one acre of continuous coverage. However, those authorizations also acknowledged too that there would be unspecified amounts of discontinuous bark coverage. These previous state-authorized ZODs depended upon state or federal enforcement actions to address violations of the one-acre ZOD. In comparison, the current general NPDES general permits for LTFs, as modified, include the Section 401 Certifications which contain state-authorized project area ZODs that limit both discontinuous and continuous deposits of bark and woody debris. The state-authorized project area ZOD provides for a one acre threshold for continuous coverage which, if exceeded, will

trigger a requirement of the permittee to submit a remediation plan to ADEC. Once the remediation plan is approved by ADEC, implementation of such plan will occur. This requirement is automatically invoked upon evidence that continuous coverage exceeds one acre and does not require the initiation of an enforcement action to obtain remediation.

Moreover, the state certifications on the LTF general permits imposed the remediation plan process on both future exceedances of the one acre threshold, but also expressly includes legacy bark accumulations from the older LTFs, something that EPA could not require under an NPDES permit without the benefit of the State certification and its conditions. Prior to a project area ZOD being authorized for any LTF, ADEC will do a site-specific review under its antidegradation and ZOD regulations to ensure that such a ZOD is appropriate for the LTF and the waterbody where it is located. EPA has determined that the general NPDES permits for LTFs, as modified, are no less stringent than previous individual NPDES permits for LTFs.

The antibacksliding prohibitions of the Clean Water Act, 33 U.S.C. §1342(o)(1), do not apply to terms and conditions contained in AK-G70-0000 as that permit is the first NPDES permit issued **under section 402 of the CWA** to those LTFs. Those LTFs previously received Section 404 permits prior to October 22, 1985. The antibacksliding prohibition in section 402(o) of the CWA applies only to section 402 permits. AK-G70-0000 is the first modifications made by EPA to the LTFs' Section 404 permits under Public Law 100-4, Section 407 of the Water Quality Act of 1987, thus, the antibacksliding prohibitions do not pertain to the terms and conditions in the general permit. Even if Section 402(o) were relevant, there is another basis upon which the antibacksliding prohibitions would not be applicable to a majority of the pre-1985 permits as well as post-1985 permits. Antibacksliding prohibitions do not apply to revised water quality-based effluent limitations for an LTF that is located in a waterbody attaining water quality standards, as long as the revised effluent limitations are consistent with the antidegradation policy. *See* 33 U.S.C. §1313(d)(4)(B). Further, in accordance with 33 U.S.C. §1313(d)(4)(A), antibacksliding prohibitions would not apply to revised water quality-based effluent limitations for LTFs located in impaired waters if the prior limit was based on a total maximum daily load (TMDL) or other wasteload allocation established under section 303(d) and there is assurance of attainment of the applicable water quality standard. Finally, as set forth above, EPA does not believe the modified NPDES general permit is less stringent than previous NPDES permits issued to such LTFs.

Enforcement of the General Permits

15. The one acre limit on continuous deposition of the sea floor by bark and woody debris provides good incentive to ensure that best management practices are followed. EPA's general NPDES permits should explicitly provide that an LTF is no longer authorized under the applicable general permit and must obtain an individual NPDES permit if monitoring data shows that the continuous deposit of bark and woody debris exceeds one acre. Federal regulations specifically provide that an individual NPDES permit may be required when "[t]he discharger...is not in compliance with the conditions of the general NPDES permit" [40 CFR § 122.28(a)(3)(A)]. Violation of the permit limit of one-acre on

continuous deposits of bark and woody debris should trigger required site restoration to return the affected area to its original habitat type.

16. EPA has no role in thresholds and remediation plans... they are vehicles of potential action or inaction controlled by ADEC outside of the NPDES permits' limits, requirements and monitoring.
17. Expanding the zone of deposit to a LTF's "project area" unlawfully relaxes the NPDES permit limits on the accumulation of continuous coverage of bark and woody debris at a site from one acre. Nothing in the ADEC's remediation provisions limits continuous coverage to one acre. A project-area zone of deposit means that bark and woody debris accumulations and impact zones would no longer constitute a violation of state water quality standards. Neither EPA, the state or the public would be able to bring an enforcement action to restrict the discharge and coverage or to require an operator to clean up an LTF site through remedial action.

EPA Response to Comments on Enforcement of the General Permits: EPA has determined that adding a one acre limit on continuous coverage is not necessary to ensure compliance with Alaska Water Quality Standards. EPA acknowledges that it has no role in implementing or enforcing the remediation plans contained in the state certifications. The state certifications, with slight modifications, were found by the State Hearings Officer to provide a reasonable assurance that state water quality standards would be maintained. Based on existing information, there is no basis for determining that any more stringent limitation or condition is needed related to continuous coverage of bark or woody debris in the general NPDES permits for LTFs.

ADEC Remediation Plan and Guidance

18. The U.S. Fish and Wildlife Service has a long history with log transfer facility issues, having conducted dive investigations at LTF sites for over 30 years. Investigations have included mapping and evaluating existing facilities, and assisting in siting new facilities. We have observed that bark and wood-dominated substrates depress biological diversity and productivity. Bark deposits in large quantities become more problematic over time as anaerobic decomposition begins. Bark deposits persist for long periods of time as some of the oldest sites we have investigated (up to 25 years since operation) have yet to recover. Given the significant shortcomings of ADEC's current guidance, however, we recommend that the EPA establish a one acre limit on continuous bark coverage in the two general NPDES permits, which if exceeded, would be a violation of the permit. Once the limit is exceeded, the site should be actively restored. Otherwise, we do not believe fish, wildlife, and their habitat will be protected over the long-term at these sites.
19. The U.S. Fish and Wildlife Service reviewed ADEC's proposed guidance and recommended improvements, including specific tests and data standards, qualifications for those providing analyses or evaluations, and incorporation of natural recovery as a control

in evaluations of new or experimental treatments. We also provided information on existing dredging technologies and discussed disputed dive surveys. Yet ADEC has neither addressed nor incorporated our comments and recommendations. We do not believe, therefore, that EPA should rely on remediation plans predicated on a ‘threshold’ and overseen by ADEC to protect fish and wildlife resources and their habitats over the long-term.

20. NMFS agrees with the proposed modification that would require a limit on continuous bark coverage which, once exceeded, would be a violation of the NPDES permit. The deposition of bark by LTFs is a well-documented damaging and persistent pollutant that reduces both the quantity and quality of habitat available for living marine resources. NMFS supports the 1985 LTF siting, construction, operation and monitoring/reporting guidelines (“1985 Guidelines”), but adherence to the guidelines alone does not eliminate adverse effects to marine resources. Further, the remediation plan process developed by ADEC (2002) is inadequate for restoring the LTFs because it allows for “natural recovery,” as a remediation plan goal, to be determined at the discretion of the operator. NMFS maintains that the overall remediation objective for deposits of bark and woody debris that exceed one acre of continuous coverage should be to return the impacted seafloor to the original habitat conditions as measured by bottom type and substrate. Since this goal was not adopted as a requirement of remediation plans by ADEC, NMFS supports a one-acre limit alternative as the most protective of marine resources and essential fish habitat. NMFS also recommends that violation of the permit should trigger immediate site restoration.

EPA Response to Comments on ADEC Remediation Plan and Guidance: EPA

acknowledges that the resource agencies’ have concerns about ADEC’s commitment to requiring and obtaining industry remediation and clean-up of industry impacts and the effectiveness of the remediation plan process. However, at this time there is no information to show that the process will not protect the marine environment and maintain state water quality standards. EPA anticipates that, when triggered under the 401 certifications, the remediation plans will result in timely and effective measures to reduce the bark accumulations and protect water quality. EPA will monitor and review the progress and success of the remediation plan process and will consider any new information regarding impacts from discharges from LTFs on the environment in future permit actions. EPA has the authority to require NPDES permit limits, conditions and other requirements necessary to protect state water quality standards. EPA will consider information learned during this permit term and, for future permits, will need to consider if the conditions of the NPDES General Permits for LTFs protect Alaska Water Quality Standards.

Application of Mixing Zones to Discharges

21. Nothing in the ADEC Hearing Officer’s decision on the limits, requirements and conditions applied to LTFs changes EPA’s obligation to include a permit limit on the continuous coverage of bark and woody debris, as the Hearing Officer was only applying state law.

22. EPA G.P. AK-G-70-0000 and G.P. AK-G70-1000 and accompanying 401 certifications submitted by the State of Alaska continue to ignore that the inescapable reality that the bark and debris will be discharged to the surface of the water and transmitted to the bottom via the water column. Section II of the GP specifically states that the “discharge of pollutants not specifically set out in this Part are not authorized under this General Permit.” The permit does not address the discharge of bark and debris to the surface waters or the water column; it only contemplates the potential impact of these pollutants on the benthos. The discharge activities themselves would therefore be prohibited under this permit. Federal regulation §40 C.F.R. 122.4(d) prohibits the authorization of a permit to discharge pollutants when the conditions required by the permit “cannot ensure compliance with the applicable water quality requirements...”
23. Sections IV(A)(4) and (A)(4) of the general NPDES permit prohibits the discharge of residues and floating material within the water column or on the surface of the water or any other violations of the Alaska WQS. Yet, EPA and ADEC have not addressed any potential impacts to the water column from this activity, even though it is accepted that significant levels of pollutants will be discharged into the water column.
24. I would note that the WQS do not necessarily deny the applicant’s ability to discharge these pollutants -- the State’s mixing zone regulation §18 AAC 70.250 might provide the applicant with the necessary legal latitude. Nevertheless, at this time no effort has been made by the State or EPA to evaluate whether a mixing zone would be appropriate or approvable.

EPA Response to Comments on the Application of Mixing Zones. ADEC’s zone of deposit applies to, addresses and allows residues “deposited” on the surface, in the water column and on the bottom. While this use of the term “deposit” can confuse, it’s meaning is developed, interpreted and applied by the State of Alaska, and the Section 401 Certifications for the NPDES General Permits for LTFs were in large part upheld under state law.

COMMENTS IN OPPOSITION to the Proposed Modification No. 3: Public comments opposed to the proposed modification were submitted by Alaska Forest Association, Concerned Alaskans, Sealaska, Koncor, Chugach, Silver Bay, Klukwan, Ketchikan Gateway Borough, State of Alaska, ADEC, University of Alaska, Alaska Chamber of Commerce, USFS, Forest and Land Management, Resources Development Council, Alaskan Miners, Southeast Stevedoring, Russell Cockrum, Steve Connelly, Lowell Petersen, Scott Burns, Charles Johnson, and John Whitehead. Points raised in the public comments included the following:

Effect of State Adjudication/Alaska Timber Task Force Threshold Level/State Certification

25. ADEC strenuously objects to a permit limit of one acre. Establishing the one-acre continuous bark cover as a threshold triggering a remediation plan was a central principle

in the Department's certification, and was linked with other decision, most notably the inclusion of "legacy" (i.e., existing bark from prior LTF operations) bark in the bark surveys. For EPA to now convert the threshold into a permit limit threatens to disrupt and undermine the basis for the Department's certification.

26. EPA's proposal is an incursion into ADEC's primary and appropriate role as interpreter of its own regulations. In this case, the Department's understanding and application of the Alaska's Water Quality Standards (AWQS) was challenged, by the same capable institutional litigant who challenged EPA's permits, in several respects. The state, industry, and Natural Resources Defense Council (NRDC) engaged in an adjudication process that took over two years, and generated an extensive record. Ultimately, an appointed hearing officer upheld the Department's certifications in almost all respects.
27. EPA's proposed modification is not based on demonstrated legal error on the part of ADEC, but rather, on a disagreement over the exercise of ADEC's discretion. However, a disagreement based policy cannot form the basis for rejecting a provision of a valid-issued 401 certification.
28. NRDC raised the same three issues in the State adjudication that EPA now cites as its reasons to convert the Department-certified "threshold" to a fixed permit limit. In the state proceeding, NRDC abandoned its anti-backsliding argument before the hearing. The hearing officer analyzed and rejected NRDC's argument that the one-acre threshold should be a permit limit. He noted that even though the Department did include one-acre ZODs for continuous bark cover in some prior individual LTF permits, it has never adopted a one-acre limit as a standard of general applicability. He concluded that the "threshold" approach was entirely consistent with the 1985 Alaska's Timber Task Force (ATTF) Guidelines, which all parties recognized as the foundation for these GPs. He discussed and rejected NRDC's argument that the Project Area ZOD will violate the State's antidegradation law, 18 AAC 70.015.
29. ADEC urges EPA to review its own August 1996 Guidance on Application of State Mixing Zone Policies in EPA-Issued NPDES Permits. That guidance requires that EPA defer to a state's interpretation of its mixing zone regulations "unless it is clearly wrong." Guidance at p.3. EPA should logically use the same approach to ADEC's ZOD determination in these GPs. Given the quality and depth of the state adjudication, as well as its result, EPA simply cannot find plain error in this case.
30. The ADEC believes that the substitution of a one-acre limit for a one-acre threshold for remediation produces unproductive administrative consequences of enforcement actions and the establishment of total maximum daily loads that will remove the Department's remediation requirements as a possible remedy. The current remediation requirement in the general NPDES permits contains no provision for EPA approval or involvement in the remediation plan development and implementation. Approval of the remediation work rests entirely with the State, not with EPA. This should be the operative administrative

remedy because a violation of a State water quality standard should be a State function, only to be intervened by EPA if the State fails to take timely and reasonable action.

31. The ADEC hearing officer in the certification adjudication specifically held that the “project area” ZOD utilizing the one-acre “threshold” approach for continuous coverage satisfied the requirements of Alaska’s water quality standards, including a specific finding that the project area ZOD constituted a “limit” under Alaska’s water quality standards. This rationale for the hearing officer’s ruling was set forth in a fifty-page opinion. In contrast, EPA has offered a couple of sentences to suggest that the hearing officer was wrong. At a minimum, to justify endorsement of Option 2, EPA must provide “compelling reasons” why the hearing officer’s decision was wrong and provide “strong scientific or technological support” for its approach. Because EPA has not even attempted to meet its legal and technical burden, Option 2 cannot be adopted.
32. There are two State regulations working against each other. The so-called residue standard imposes a “no discharge” limitation for bark accumulations. The ZOD, on the other hand, makes the residue water quality standard inapplicable for the area covered by the ZOD. The central questions in the State adjudicatory proceeding, which has been reinvigorated by EPA here, was whether ADEC improperly exercised its discretion in establishing the ZOD. What EPA has failed to appreciate, is that a ZOD cannot be established by any agency other than ADEC. Even if EPA were to conclude that ADEC committed clear error, it would have not authority to rectify the error through changes to the ZOD. ADEC – not EPA – would have to make the necessary changes.
33. It is abundantly clear that EPA’s proposed modification runs afoul of the precedent established by the EAB in Ketchikan Pulp Company. In short, even if EPA were to conclude on some basis that ADEC committed “clear error” in establishing its ZOD, the remedy for such a determination is to remand the 401 certification back to ADEC for further proceedings. This is the only outcome permissible under Ketchikan Pulp Company in the absence of explicit direction from ADEC or the Alaska Department of Law that EPA itself is authorized to *establish* ZODs under the auspices of ADEC’s regulations.
34. EPA’s determination that a one-acre limit is necessary to comply with and implement Alaska Water Quality Standards is contrary to the final decision of the independent hearing office in *In re. the Matter of EPA General Permits AK-G70-1000 and AK-G70-0000* (Alaska Department of Environmental Conservation, May 10, 2002). The hearing officer ruled that, subject to certain conditions, the general permits’ project area zone of deposit, coupled with (1) the remediation process in ADEC’s state wastewater permits; (2) EPA’s adoption of the Alaska Timber Task Force (ATTF) siting and operational guidelines as mandatory permit standards; and (3) ADEC’s commitment to provide public notice for all Notices of Intent for new, previously unpermitted LTFs, would provide a reasonable assurance that discharges under these permits will comply with all Alaska Water Quality Standards, including Alaska’s anti-degradation rule. The Hearing Officer concluded that the project area zone of deposit had “limits,” as required by 18 AAC 70.012.

35. In this proposed modification, EPA proposes to implement a standard that “a permittee *shall not exceed* 1.0 acre of continuous coverage of the sea floor by 100% bark and woody debris with a thickness of 10 cm. or greater at any point.” EPA presumes that the precision of the measurements of the bark coverage is appropriate to set standards to the tenth of an acre. The range of variation among divers in interpretation of bark coverage, along with other factors, make this proposed modification one that is based on an expectation of precision that is not supported by accuracy. Information gathered by the Forest Service on bark monitoring accuracy shows variability. This information on the variability and imprecision of dive surveys of continuous deposits of bark and woody debris supports the use of estimates of bark area as a threshold.

EPA Response to Comments on the Effect of the State Adjudication/Alaska Timber Task Force Threshold Level/State Certification: EPA has determined that a modification to the general NPDES permits adding a one acre limit on continuous coverage is not necessary to maintain state water quality standards. The 401 certifications were upheld, in substantial part, through the adjudication process. EPA’s decision is based primarily on the result of the adjudication and the record for the general NPDES permits for LTFs, as modified. One of the key factors in the state adjudication’s opinion was the remediation plan process. It is anticipated that the state remediation plans will result in continuous bark accumulations being maintained at or below one acre and a thickness of less than 10 centimeters. If new information indicates that continuous coverage is increasing larger than one acre or impacts are significantly different, EPA has the authority to determine in the future that additional limits or conditions are necessary on discharges from LTFs. Some commenters state that EPA has no authority to add a limit on continuous coverage of bark. EPA’s decision on this proposed modification makes that point moot; however, EPA does not concede that placing additional restrictions and/or limits onto discharges of bark and woody debris within a state-authorized ZOD are outside of EPA’s authority under the Clean Water Act. Other comments would require EPA to be bound by history and intent language contained in the Alaska Timber Task Force Guidelines; however, as commenters themselves have pointed out, the Guidelines are not regulations nor can they be interpreted to establish standards of general applicability or have any legal standing that would limit EPA’s permit decisions. The legal effect and/or consequences of terms, conditions, and effluent limitations placed into federally-issued NPDES permits is controlled by federal law and regulations. In this instance, EPA has determined that the NPDES LTF general permits, as modified, meet all federal law requirements.

Anti-backsliding

36. ADEC maintains that the anti-backsliding provision does not apply to ZODs, because a state-authorized and certified ZOD is not an “effluent limitation” as that term is used in the anti-backsliding provision, 33 U.S.C. §1342(o). The term is defined to include “quantities, rates, and concentrations of chemical, physical, biological or other constituents which are discharged from point sources into... the ocean.” 33 U.S.C. §1362(11). A ZOD is an

allowed area on the ocean floor where deposits may settle. There is no authority or precedent for applying the anti-backsliding provision to a state decision of this kind.

37. It may be that EPA believes that the historical, although not uniform, inclusion of one-acre ZODs in some individual NPDES permits, both for LTFs and the seafood industry, has written a one-acre limit into the ZOD regulation itself, 18 AAC 70.210. It is obvious that the regulation contains no such limit. The hearing officer correctly concludes that a practice of authorizing one-acre ZODs in some past permits does not establish a general standard to which the Department must forever adhere.
38. Anti-backsliding - EPA suggests that because some individual permits had one-acre ZODs, then the establishment of a project area ZOD might run afoul of CWA Section 402(o)'s anti-backsliding requirements. This concern is misplaced for the following reasons. First, the anti-backsliding requirements only apply to a permit that is "renewed, reissued, or modified." These circumstances are all defined with specificity in EPA's Part 122 regulations. The general permits in this proceeding are newly created and clearly do not constitute a renewal, reissuance, or modification of a permit. Second, even if EPA were to ignore the "renewal, reissue, modify" aspects of Section 402(o), there is no non-arbitrary way to compare the limits in the general permits with the limits contained in the Corps 404 permits and individual NPDES permits. The questions whether the general permit present "less stringent" effluent limitations cannot be answered in the abstract. It is a question that can only be resolved in the context of examining the precise terms of each former permit in relation to the terms of the specific general permit. EPA apparently wants to gloss over this problem by assuming that a one-acre "limited" ZOD was a universal requirement of past permits. However, the hearing officer in the State adjudication specifically ruled that a fixed one-acre ZOD "was never formally adopted by DEC as a standard of any kind." At most, ADEC and EPA employed the one-acre ZOD in some individual permits. However, some facilities had permits authorizing ZODs of unlimited size. LTFs vary greatly in size, and the volume of timber transferred through them—and the size of bark accumulation areas—is largely a consequence of the physical layout of the facility, the nature of the waterbody and bottom morphology, and the volume of timber to be transferred over the facility. To suggest that a ZOD authorized for some facilities should somehow serve as a universal restriction on all existing and future facilities is arbitrary and an abuse of EPA's regulatory discretion. Third, several of the anti-backsliding exceptions in Section 402(o)(2) are relevant here and provide a strong legal foundation for EPA to conclude that the prohibition of Section 402(o)(1) does not apply. As EPA has acknowledged, past ZOD authorizations were based on a (mistaken) factual premise that accumulations were largely limited to a one-acre area. The agencies failed to provide permit language in recognition of the factual reality that bark accumulations can be widespread. The agencies also failed to appreciate that the reside standard imposes a "no discharge" prohibition on any area that is not covered by a ZOD. Industry raised these issues with the agencies in the late 1990's. The general permits have been revised to correct these mistaken factual and legal premises. The administrative record clearly shows that many of the historical permits were arbitrary

since they did not comport with the factual and legal circumstances existing at a typical site.

39. The Alaska Timber Task Force recommended, based on no scientific evidence, that when continuous bark coverage within a LTF ZOD reached one acre in size with a bark depth of 10 cm. or greater, the ADEC, *at their discretion*, could require the operator to initiate a remediation plan or possibly remove some of the woody debris material. The arbitrary one-acre figure was meant to be nothing more than a trigger for higher scrutiny of the site. In no way was it intended to be an upper threshold of bark deposition.
40. The rigid one-acre limit on the continuous deposit of bark and woody debris is arbitrary, as it has no regulatory precedent. The State of Alaska's one acre zone of deposit has never been adopted by ADEC as a standard of any kind, and was never intended as anything but a threshold for the assessment of possible site-specific remedial measures. The ADEC hearing officer found The hearing officer found that the project area ZOD did not "fundamentally relax" any pre-existing "one-acre ZOD" standard because, according to the hearing officer, a one-acre ZOD "was never formally adopted by DEC as a standard of any kind."
41. The administrative record clearly shows that many of the historical permits were arbitrary since they did not comport with the factual and legal circumstances existing at a typical site. Finally, although a one-acre ZOD may have been sufficient for certain smaller facilities, dive surveys indicated that a one-acre ZOD was insufficient to cover discharges from other larger facilities and in some facilities located in waterbodies with poor flushing. Changes to facilities, such as an increase in timber volume, changes in the layout of adjacent log rafting areas, or even changes in currents and flushing due to reasons beyond the permittee's control all indicate that the ZOD needs to be an elastic regulatory tool. The exceptions to the anti-backsliding provision—set forth in Section 402(o)(2)(A), (B), (C), and (E) – recognize that permit limits should not be cast in stone and need to account for changes at facilities. This is particularly true for LTFs, where the factual circumstances at each site are often highly variable.

EPA Response to Comments on Antibacksliding: EPA has determined that proposed modification to add a one acre limit is not necessary, and we have determined that the general NPDES permits are not less stringent than previous individual permits, thus, antibacksliding is not an issue. Conversely, antibacksliding prohibitions of the Clean Water Act do not apply to AK-G70-0000 at all, nor to a majority of the LTFs that may be authorized under AK-G70-1000.[See EPA Response to In Favor Comments regarding antibacksliding above.]

Environmental Impacts of Continuous Coverage/Remediation Plans

42. The Department of Environmental Conservation has reviewed all the dive surveys submitted to date and finds that figures used in EPA's public notice are out of date. Based upon dive surveys submitted to the Department there are only 6 facilities reporting

continuous cover bark greater than 1.0 acre. The Department finds that 5 of these facilities are reporting continuous cover bark greater than two-acres. The Department has review all dive survey received to date and has created a table that displays the amount of continuous bark cover. Eighty-three facilities have submitted bark dive surveys to date. The vast majority of current facilities are compliant with the one-acre threshold.

43. The U.S. Forest Service supports the alternative of one acre as a threshold. The Forest Service has spent considerable time and money working with ADEC and others in the development and testing of bark remediation guidelines including approximately \$250,000 in costs associated with contracting for bark remediation plans to “beta test” the ADEC guidelines of January 2002. With the large amount of time and money expended in a cooperative effort to proceed with remediation, the Forest Service has shown commitment to working with ADEC to manage bark accumulations at its LTF sites. Given the commitment and cooperation, a change in regulatory philosophy is not appropriate.
44. The one-acre limit on the continuous deposit of bark and woody debris is arbitrary, as it has no ecological, technical or practical significance as a hard-and-fast rule. The State Hearing Officer had considered “the potential impacts on aquatic life and other wildlife, including the potential for bio-accumulation and persistence.” That issue had been explored in depth by the Hearing Officer, which concluded that: (1) “the only significant impact of bark and woody debris on the benthic environment is the burial of organisms on the marine bottom”; (2) “there appears to be consensus among scientists, regulators, and interested parties that adherence to the ATTF guidelines” will minimize impacts of burial on aquatic life; and (3) “toxicity [to other aquatic life] will not occur outside of the bark and wood debris pile.” In deciding what the word “threaten[ing]” water quality meant in 18 AAC 72.900(a)(5), the hearing officer ruled that water quality would be impermissibly threatened if either: (1) water quality violations would occur outside the ZOD; or (2) existing uses would be impaired. Relying on basic tools of statutory construction, the hearing officer concluded that use impairment must focus on uses of the “waterbody as a whole,” and not simply on uses within the ZOD itself. And this reading, in turn, is consistent with longstanding EPA policy, which stresses that compliance with a state’s anti-degradation policy is measured outside the ZOD or mixing zone.
45. The predominance of pre-1985 LTFs among those LTFs with continuous deposits of bark and woody debris that exceed one acre indicates that the Alaska Timber Taskforce Guidelines have been an effective tool in controlling the impacts and burial of sea floor by bark and woody debris and protecting the marine environment in the presence of active log transfers along the shore.

EPA Response to Comments on Environmental Impacts of Continuous

Coverage/Remediation Plans: The information in the administrative record regarding environmental impacts from discharges from LTFs supports the need to regulate the amount, both the areal extent and thickness, of bark accumulations on the ocean bottom. Although toxicity from decomposition can be limited to areas of continuous coverage, the extent of such

continuous coverage is key in whether the waterbody as a whole can support beneficial uses. EPA has determined that the state's ZOD authorization process and remediation plans, when needed, should protect state water quality standards and, thus, no additional limit on continuous coverage is necessary. [See EPA Response to In Favor Comments regarding Environmental Impacts of Bark and Woody Debris above.]

Modification Process

46. EPA cannot modify these general NPDES permits and implement a one acre limit on the continuous deposition of bark and woody debris because EPA can only modify an NPDES permit on the basis of new information or changes in the applicable water quality standards, neither of which apply in this case.
47. Under § 407, P.L. 100-4, EPA is limited in its ability to supplant the Army Corps of Engineers (ACoE) as the regulatory body responsible for overseeing pre-1985 LTFs. While EPA can make certain changes to these ACoE permits for LTFs after an opportunity for a hearing (which EPA has not provided), ACoE is otherwise exempt from the NPDES program's procedural requirements. The limitation of continuous deposits of bark and woody debris at an LTF as an NPDES-based EPA enforcement regime would exceed EPA's authority under § 407, which intended that LTFs would be regulated pursuant to the ATTF Guidelines and their threshold approach to remediation.

EPA Response to Comments on the Modification Process: See Response to Comments on Proposed Modification No. 1.

Proposed Modification No. 4 – EPA proposed a major modification to reduce the threshold for the development and implementation of remedial practices to control bark deposits from 1.0 acre to 0.75 acre and apply it to both shore-based and off-shore LTFs, add this condition to AK-G70-0000, and provide the term “remedial practices” to the “Definitions” section.

Final Modification No. 4 – **Withdrawn; no modification.**

COMMENTS IN FAVOR of the Proposed Modification: Public comments in favor of the proposed modification were submitted by NRDC, SEACC, CSAW, NMFS, USFWS, Village of Kake, Hydaburg Cooperative Association, Hoonah Indian Association, Kay Andrew, Brian McNitt, Floyd Peterson, and Joseph Sebastian. Points raised in the public comments included the following:

1. The ADEC does not object to this modification. The Department recommends that this figure be revised to either 0.7 or 0.8 acres since the accuracy of current dive protocols do not support the use of two decimal places. Implementation of this modification may result in a reduction in the number of facilities with continuous cover bark approaching or exceeding the one-acre threshold. Three facilities are currently reporting continuous cover

bark at 0.7 acres. Two facilities are reporting 0.8 acres of continuous cover bark and two facilities are reporting 1.0 acre. This represents approximately 8% of the entire LTF population that requires an annual dive. It is reasonable to require that LTF operators review current Best Management Practices and revise if necessary if continuous bark cover is at 0.7 or 0.8 acres or higher. It is likely to be far less expensive to modify upland transfer practices than prepare and implement a remediation plan if continuous cover bark continues to accumulate and eventually exceeds the one-acre remediation threshold. This proactive approach will encourage LTF operators to examine current practices prior to exceeding the remediation threshold.

2. The modification would help prevent actual exceedance of the limit on continuous bark coverage at LTFs by requiring development and implementation of pollution practices when they are needed to prevent long-term effects.

COMMENTS IN OPPOSITION to the Proposed Modification: Public comments opposed to the proposed modification were submitted by Alaska Forest Association, Concerned Alaskans, Sealaska, Koncor, Chugach, Silver Bay, Klukwan, Ketchikan Gateway Borough, State of Alaska, ADEC, University of Alaska, Alaska Chamber of Commerce, USFS, Forest and Land Management, Resources Development Council, Alaskan Miners, Southeast Stevedoring, Russell Cockrum, Steve Connelly, Lowell Petersen, Scott Burns, Charles Johnson, and John Whitehead. Points raised in the public comments included the following:

1. We oppose the decrease in the areal threshold on the extent of the continuous coverage of the seafloor by bark and woody debris from 1.0 acre to 0.75 acre and support the retention of a one-acre guideline as a threshold for a site-specific preparation of an ADEC-approved remediation plan. Imposing a 0.75 acre threshold for the development of a remediation plan compounds the error of imposing a rigid one-acre limit. There is no scientific or technical basis for this proposal; it is arbitrary and capricious.
2. It is simply not possible to measure bark accumulations with the degree of precision suggested by a 0.75 acre threshold. It is not reasonable to ask dive surveyors to measure accumulations so precisely, because bark cannot be mapped to 100ths, or even 10ths, of an acre.
3. The ADEC hearing officer ruled that a flexible approach to remediation was preferable from both a water quality and practical point of view, since dredging of bark can often do more harm than good, and, at a minimum, may not be cost-justified in particular cases. Removal is not always environmentally preferred, and even when it is preferred based on environmental considerations, a cost-benefit analysis might lead regulators to select other options. Natural recovery through implementation of more stringent operational or oversight measures and sedimentation, transport and degradation is the preferred remediation method in some circumstances.

EPA RESPONSE TO COMMENTS ON PROPOSED MODIFICATION NO. 4

Modification No. 4 was proposed on the basis that EPA believes that the planning and implementation of preventive measures to avoid an exceedance of Alaska Water Quality Standards should precede an exceedance rather than be initiated at the time of an exceedance. However, ADEC's Section 401 Certifications created a threshold of one acre of continuous coverage and 10 centimeters of thickness to be the point of further regulatory review and information development. The NPDES General Permits require that additional measures and/or operation practices be taken once continuous coverage reaches one acre which is consistent with the Section 401 Certifications.

Analysis of dive surveys of deposits of bark and woody debris have clearly indicated that the precision on such surveys is often more than ± 0.1 acre. In view of this level of precision and its implications both for assessments of bark deposits and a threshold for remediation, EPA believes that the original permit language of 1.0 acre is both appropriate and protective of a 1 acre threshold for remediation and the Alaska Water Quality Standard for residues of bark and woody debris. (Note: One acre is a number whose precision extends to the unit level of measurement whereas 1.0 is a number whose precision extends to the tenths of a unit level of measurement.) EPA has determined not to make the proposed modification to the original permit language.

Proposed Modification No. 5 – Monitoring of bark deposition should be conducted to a depth of -100 ft, the maximum depth of SCUBA diving without an on-site decompression chamber under OSHA, to support the protection of the AWQS and to be consistent with statewide SCUBA monitoring. EPA proposed a major modification to increase the maximum depth for the monitoring of bark deposits from -60 ft MLLW to -100 ft, without reference to MLLW

Final Modification No. 5 – The permits will be modified to require that when continuous coverage of bark and woody debris is found at -60 ft. MLLW, the bark survey must continue to survey the continuous coverage to the boundary of continuous cover or -100 ft, whichever occurs first.

COMMENTS IN FAVOR of the Proposed Modification: Public comments in favor of the proposed modification were submitted by NRDC, SEACC, CSAW, NMFS, USFWS, Village of Kake, Hydaburg Cooperative Association, Hoonah Indian Association, Kay Andrew, Brian McNitt, Floyd Peterson, and Joseph Sebastian. Points raised in the public comments included the following:

1. The seafloor monitoring of the continuous bark coverage should be extended to -100 ft or beyond to determine the full extent of continuous coverage. Monitoring to -60 ft is only part of most LTF sites. Even monitoring to -100 ft may not provide a complete assessment of the impact zone of an LTF's deposition of bark and woody debris. A permittee has an obligation to monitor its discharges' exceedance of the Alaska Water Quality Standards and impact on Alaska's waters regardless of depth, even if it requires techniques other than diver observations. Feasible techniques other than dive surveys, such as remotely

controlled cameras, can and have been used at reasonable cost and without human endangerment to survey seafloor deposits of bark and woody debris.

2. This proposed modification would bring the general permits into compliance with the OSHA limit for commercial scuba diving without an on-site compressor. The modification would further extend the area investigated for monitoring requirements of bark surveys to provide additional information on the impacts of LTFs to the environment. Further, the dive surveys should be extended to -100 feet MLLW for the assessment of both continuous and discontinuous bark deposits.
3. Subsequent to development of the 1985 ATTF Guidelines, in 1996 Congress amended the Magnuson-Stevens Fishery Management and Conservation Act to provide for the conservation of Essential Fish Habitat. A number of the over 70 commercial fishery species for which Essential Fish Habitat has been defined are groundfish, known to range in waters that are promoted as desirable siting depths by the guidelines (40 feet and deeper). Little is known of the effects of LTFs on these species despite the persistence of some bark deposits for over 30 years.
4. The ADEC hearing officer's decision acknowledged that the State regulations and supporting certification provided adequate authority to require monitoring below -60 feet MLLW. If EPA proceeds with this proposed amendment, ADEC prefers that the language used throughout the permits reflect "-100 feet fsw.". The EPA's proposed modification of the dive depth also presents uncertainty regarding the procedures to be used by divers. It is unclear if EPA is proposing to extend the scope of the dive protocols for continuous cover to include establishing plots and measuring the depth of the bark at each sample point. The Department is interested in gaining as much useful information on the continuous bark footprint as possible but does not support extending the plot and depth measuring requirement.

COMMENTS IN OPPOSITION to the Proposed Modification: Public comments opposed to the proposed modification were submitted by Alaska Forest Association, Concerned Alaskans, Sealaska, Koncor, Chugach, Silver Bay, Klukwan, Ketchikan Gateway Borough, State of Alaska, ADEC, University of Alaska, Alaska Chamber of Commerce, USFS, Forest and Land Management, Resources Development Council, Alaskan Miners, Southeast Stevedoring, Russell Cockrum, Steve Connelly, Lowell Petersen, Scott Burns, Charles Johnson, and John Whitehead. Points raised in the public comments included the following:

1. We oppose the modifications to extend the depth of the dive surveys from -60 ft to -100 ft because it will unnecessarily increase operator costs and endanger human life. The general NPDES permits, as certified by ADEC, already allow ADEC to require operators to monitor below 60 feet when circumstances warrant taking the inevitable risk of deeper diving. In remote areas where LTF dives occur, a case-by-case evaluation of the need for deeper dives is all that prudence allows. Moreover, EPA has unintentionally drafted the proposed amendment so as to actually require dives as deep as -120 ft below the surface.

2. The requirement that diver assessments of the deposition of the seafloor by bark and woody debris shall be conducted to -100 ft has been judged to be unnecessary because ADEC's certification requires LTF operators to survey below 60 feet "[i]f the Department (i.e., ADEC) finds that continuous coverage is likely to extend beyond minus 60 feet MLLW", the hearing officer found NRDC's claim on this count to be without merit: "DEC's certification, over industry's strong objection, added authority on its part to require such surveys [below 60 feet] in appropriate circumstances...[Therefore] I conclude that the one-acre/10 cm. Threshold is not rendered "unreasonable" by the absence of a requirement that surveys be conducted below that depth in all cases.
3. A routine -100 ft dive for bark monitoring surveys would render SCUBA surveys impractical. Decreased bottom times and increased surface intervals are required for such deeper diving. The deeper dive survey requirement, in conjunction with the 15 ft intervals for survey stations, would triple the cost of conducting dive surveys and materially increase risk to divers.
4. While it is unclear what EPA intends in terms of dive protocols beyond the -60 feet depth, it is clear that the change to -100 fsw will not increase consistency with other permits' requirements, as implied by the public notice. The EPA's Seafood Processors GP for Alaska does require scuba monitoring of seafood waste piles to -100 feet; however, both the frequency and the protocols are substantially different from that required in the LTF GPS. The Seafood Processing GP requires that the permittee monitor its processing and discharges to the extent necessary to develop and submit a timely and accurate annual report and to detect and minimize occurrences of noncompliance. This Seafood Processing GP has a tiered approach to monitoring based upon the findings of the dive survey completed during the first year of operations. The methodology for establishing transects is different from the LTF dive surveys. The Seafood Processors GP states that the monitoring program shall be tiered in levels of increasing complexity which are determined by the area of the discharge waste pile as assessed in previous seafloor monitoring surveys. Seventy-nine percent of all LTFs that require an annual bark dive are reporting 0.5 acres or less of continuous cover residue but are required to complete dive surveys every year unless there was no transfer activity during that year. The Seafood GP requires a simple swim-over establishing a distance from edge to edge of continuous residue greater than ½ inch deep. There is no requirement to establish plots or measure depth. These differences in dive survey approaches in part recognize the differences in the kinds of waste materials.
5. The Dive Officer for the ADF&G estimates that permittees can expect the average cost of an annual dive to at least double given reduced bottom time and increased surface interval time between consecutive dives. Bottom time includes the time from when a diver begins to descend from the surface to the time a diver begins to ascend to the surface.

<u>Depth</u>	<u>Maximum No-Stop Bottom Time</u> <u>with Air</u>	<u>Maximum No-Stop Bottom Time</u> <u>with Nitrox I</u>
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-50 ft	100 minutes	200 minutes
-60 ft	60 minutes	100 minutes
-70 ft	50 minutes	60 minutes
-80 ft	40 minutes	50 minutes
-90 ft	30 minutes	40 minutes
-100 ft	25 minutes	30 minutes

It is apparent that given the time required to descend to the depth of -100 feet fsw that divers have insufficient bottom time in which to conduct surveys.

6. The need for this proposed modification is not supported by dive survey data. The additional information gained will only affect two facilities. The ADEC has reviewed the most recent dives for each facility and has found that only 5 dives reported continuous cover extending beyond -60 feet MLLW. Three of these facilities will be proposed for listing as impaired on the upcoming Section 303(d) list and will not be eligible for a GP authorization by the state. One facility is currently showing one acre (March 2002). The Department recently informed this permittee that a swim-over of continuous cover brk extending below -60 feet MLLW will be expected on the next dive survey. The last facility had only one transect with continuous cover at -60 feet MLLW and the depth was measured at 8 cm. or less at the last plotted sample site.
7. Although EPA's introduction of the change in dive procedures may appear somewhat insignificant and even consistent with dive safety procedures, this proposal is more far reaching from a policy perspective because it cast aside a long-held industry/agency deliberated decision without a full airing to the parties involved in the previous decision. EPA is proposing to revise sections of the ATTF Siting guideline without involving other regulatory agencies or the regulated community. EPA participated in the development of the Guidelines and is now proposing a major modification in the absence of discussion and input from other affected parties. If EPA has specific concerns about dive requirements, the most appropriate approach is to consider revising the current dive protocols through a thoughtful public process with all interested parties.

EPA RESPONSE TO COMMENTS ON PROPOSED MODIFICATION NO. 5:

The modification was proposed on the basis that EPA understands (1) the Alaskan Water Quality Standards to apply to receiving waters regardless of depth and (2) the Occupational Safety and Health Administration's guidelines to be protective of SCUBA diver monitoring of the deposition of woody residues at LTFs. The public comments have underscored the challenges and hazards of conducting SCUBA assessments in remote Alaskan waters. In view of these considerations, EPA has re-evaluated the reasonable and prudent conditions for conducting SCUBA assessments such that extending a survey beyond -60 ft MLLW to -100 ft should be undertaken only when a continuous bark deposit occurs at the -60 ft MLLW depth and should be extended to a depth of no more than -100 ft to the extent that the deposit of woody residues remains continuous and deeper than 10 cm at any point. In this way the monitoring supports the

protection of the Alaskan water quality standard for residues and the preservation of diver safety as defined by OSHA. EPA notes that alternative methods for monitoring bark and woody residues exist in the use of ROVs with underwater video recording and transmission and various mechanical sampling techniques using grabs or cores.

Proposed Minor Modification (No. 6) That Received Significant Public Comment –

Monitoring of bark coverage should be conducted every 15 ft along a transect to provide adequate accuracy in the determination of bark deposition and to include the specific stipulation of the ADEC consistency determination rather than distances of 50 ft in areas of continuous bark coverage and of 100 ft in areas of discontinuous or no bark coverage in Section V.C.5.d [p. 12] of AK-G70-0000, “(Bark Monitoring and Reporting) Methods.” EPA proposed to modify the permit to decrease the distance between bark monitoring stations along a transect from 50 and 100 ft intervals to 15 ft intervals.

Final Modification No. 6 – Withdrawn; no modification.

COMMENTS IN FAVOR of the Proposed Modification: No public comments were received explicitly in favor of the proposed minor modification to require that a seafloor back survey complete an assessment of bottom coverage at 15 ft intervals along survey transects across a log transfer facility site.

COMMENTS IN OPPOSITION to the Proposed Modification: Public comments opposed to the proposed modification to Section V.C.5.d of AK-G70-0000 were submitted by ADEC, Alaska State Chamber of Commerce, USFS, Sealaska, Chugach, Koncor, Silver Bay Logging, Yak-Tat Kwaan, Era Aviation, Southeast Stevedoring, VanNess Feldman, Concerned Alaskans, and John Whitehead. Points raised in the public comments included the following:

1. This ostensibly “minor” modification is not “minor” at all, but a heavy and arbitrary new burden on dive surveyors. Nor is it necessary to confirm to ADEC’s certification. It appears that EPA has simply misread ADEC’s certification on this account.
2. EPA’s statement that “the 50 and 100 foot transect increments are not consistent with the Department certification,” is not correct. The certification requires that, if during the establishment of what is planned to be the outside *lateral* transect and the diver sees continuous cover bark extending at least 15 feet perpendicular to the lateral transect, an additional transect must be established. EPA has misconstrued this to mean that survey stations must be no more than 15 feet apart.
 - First, the rule applies only to “lateral transects.” If the permittee is using radial transects, which is permissible under the General Permits, the rule has no applicability at all;
 - Second, the rule applies only to the two lateral transects “that bound the two sides of the survey area”-that is, the boundary transects at the far left, and the far right, of the

LTF. The rule does not apply to those transects that lie inside those boundary lines; and

- Third, the rule does not even require 15-foot measuring stations along the two lateral boundary transects. It only requires the diver, as he (or she) swims along a boundary transect, to look 90 degrees to his left (or right, as the case may be) to see if continuous coverage continues “beyond” that boundary. If he sees continuous brk continuing more than 15 feet to the left (or right, as the case may be) of the boundary, then he must establish another transect line to the left (or the right, as the case may be). Thus, EPA has simply misread ADEC’s rule.
3. The Department in it’s “Required Methods for Bark Surveys and Bark Area Calculation under the LTF General Permits” document, available on our website, *requests* that LTF operators establish plots no more than 15 feet apart along transect lines regardless of bark composition or survey pattern (parallel or radial). To date the Department has found wide spread compliance with this request and sees no reason to make this a requirement.
 4. EPA may establish maximum limits and still allow the State of Alaska to use more frequent stations for monitoring the zone of deposit.
 5. Because of decreased bottom times and increased surface intervals required by survey stations every 15 ft along a transect, EPA’s proposed modification, when coupled with EPA’s extension of the required bark survey depth to -100 ft, will triple the cost of conducting dive surveys and materially increase diver risk..
 6. The proposed change will make the permit requirements more burdensome, reduce the availability of the permit to the forest products industry and the US Forest Service, and greatly increase the likelihood of third party litigation. Although many surveys utilize the 15-foot spacing, there should be discretion to allow wider spacing for larger sites. Otherwise, due to the fact that most sites do not have lodging facilities associated with them, divers will be required to make multiple trips to some dive sites.

EPA RESPONSE TO COMMENTS ON MINOR MODIFICATION (NO. 6):

The modification was proposed on the basis that EPA believes that a monitoring station intervals of fifty feet distance allows an error in the accuracy of a survey of woody residue deposits of as much as 28% (0.28 acre or 12,197 sq.ft.) on the basis of sampling intervals alone. A monitoring station intervals of 15 ft reduces the amount of error to an accuracy of as much as 8.7% (0.087 acre or 3,799 sq. ft.). These calculations use a hypothetical deposit that is a circle of diameter 236 ft as a model. If the deposit varies towards an ellipse along bathymetric contours that are parallel to the shoreline, the theoretical accuracy of a line transect decreases still further from that of a circular model. If the deposit were to be an ellipse positioned in the direction of

the transect (as might happen when the woody debris settled in a shore to ocean canyon), the theoretical accuracy of a line transect would increase.

EPA and ADEC have evaluated the dive surveys and found that a number of variables affect the accuracy and precision of diver surveys of deposits of bark and woody debris on the seafloor. Since monitoring the extent of residue deposits and compliance of such deposits with state water quality standards is ultimately tied to ADEC's authorities under the Alaska Water Quality Standards and its authorization of a variance from these standards in its zone of deposit, ADEC has taken the regulatory lead in overseeing the monitoring of its ZODs and providing guidance for and review of dive surveys at LTFs. In the absence of a permit limit requiring compliance and enforcement, EPA defers to ADEC's leadership in administering the monitoring of bark and woody debris deposits on the seafloor at LTFs. ADEC has requested that the permit language for diver surveys at LTFs remain at 50 ft intervals and uses its discretion to adjust this guidance on a case-by-case basis at individual LTFs. EPA has determined not to make the proposed modification to the original permit language.

NUMEROUS MINOR MODIFICATIONS ARE BEING MADE. ALTHOUGH NOT REQUIRED TO BE PLACED IN A DRAFT PERMIT AND SUBJECT TO PUBLIC NOTICE, EPA NOTIFIED THE PUBLIC ABOUT THE MINOR MODIFICATIONS IN ITS FEDERAL REGISTER NOTICE, [CITATION]. OTHER THAN THE MINOR MODIFICATIONS DISCUSSED ABOVE, EPA DID NOT RECEIVE PUBLIC COMMENT ON THE MINOR MODIFICATIONS AND IS MAKING ALL OF THE MINOR MODIFICATIONS PROPOSED.